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Order 2002-6-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 4th day of June, 2002

Served: June 4, 2002

U.S.-U.K. Alliance Case

Docket OST-2001-11029 - 138

**Joint Application of American Airlines, Inc.
and British Airways Plc for statements of
authorization and related exemption authority**

Docket OST-1999-6507

ORDER DISMISSING PETITION FOR RECONSIDERATION

Summary

By this Order, we dismiss the petition for reconsideration of Order 2002-4-4 filed by Continental Airlines, Inc., (Continental) on April 24, 2002, as premature.

Background

By Order 2002-4-4, issued April 4, 2002, the Department granted final approval and antitrust immunity for alliance agreements between and among United Air Lines, Inc. (United), British Midland Airways Limited d/b/a bmi British Midland (bmi), Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System, and their wholly-owned affiliates (hereafter collectively referred to as "United/bmi,") subject to a number of conditions, including the condition that the United States achieve, within six months from the issue date of that order, an Open Skies aviation agreement with the United Kingdom that meets U.S. aviation policy objectives. We

also granted United/bmi the necessary exemption authority and statements of authorization to implement their proposed alliance/code-share arrangements.¹

In taking this action, we found that our decision in this case granting United/bmi's request, subject to conditions, met the relevant decisional standards for approval of and antitrust immunity for alliance agreements under 49 U.S.C. §§41308 and 41309. We found that our action, as conditioned, would not eliminate any actual or potential competition in the relevant markets; that, moreover, it could help the United States achieve an Open Skies agreement with the United Kingdom; and that replacing the current restrictive U.S.-U.K. Bermuda 2 agreement with an Open Skies agreement would provide important public benefits. We further found our decision to be consistent with our policy of promoting pro-competitive and pro-consumer international aviation alliances, and that, in this specific instance, the addition of bmi to the immunized alliance would benefit travelers by providing them with additional service options.

Finally, we noted that in taking this action with the condition that the final approval and antitrust immunity for the carriers' alliance agreements would become effective only after the achievement of an Open Skies aviation agreement with the United Kingdom that meets U.S. aviation policy objectives, we were fully complying with our long-established policy that a U.S. air carrier and a foreign air carrier may obtain the authority to operate an immunized alliance only when the United States has in place an Open Skies agreement with the foreign carrier's homeland.

Petition for Reconsideration

On April 24, 2002, Continental filed a petition for reconsideration of Order 2002-4-4. Continental urges that we reconsider our action approving the United/bmi alliance agreement, and either deny it or defer final action until the United States reaches an Open Skies agreement with the United Kingdom that ensures open access for U.S. carriers at London's Heathrow Airport. Continental raises four main arguments. First, it believes that our action was contrary to our policy that, before we will approve and immunize an alliance between a U.S. carrier and a foreign carrier, an Open Skies agreement must be in place with the homeland of the foreign carrier in question. Second, it believes our action violates due process because interested parties cannot comment on the alliance in the context of any Open Skies agreement reached and the ability under such an agreement for new U.S. carrier access at Heathrow Airport. Third, it believes that any new agreement reached must address airport access issues for U.S. carriers. Finally, it questions the ability of the United Kingdom to

¹ In that order, we also (1) granted motions of American Airlines, Inc. and British Airways Plc to dismiss their joint applications seeking approval of and antitrust immunity for their alliance agreement, and to dismiss their requests to engage in reciprocal code-sharing under that alliance agreement; and (2) denied a motion of Continental, Delta Airlines, Inc., and Northwest Airlines, Inc. to dismiss the applications of United/bmi in Docket OST-2001-11029.

negotiate Open Skies given an opinion of the Advocate General for the European Court of Justice.

Responsive Pleadings²

On May 8, 2002, answers to Continental's petition were filed by United/bmi, Federal Express Corporation (Federal Express), Delta Air Lines, Inc. (Delta), and the City of Houston and the Greater Houston Partnership (Houston).

United/bmi and Federal Express oppose Continental's petition. United/bmi state that the petition does not contain any new information or arguments to support reconsideration. They state that while Continental suggests that we should allow parties to comment on the United/bmi alliance in light of any Open Skies agreement ultimately reached with the United Kingdom and the extent of Heathrow access available to U.S. carriers, the Department's competition analysis in Order 2002-4-4 was not based on the attainment of Open Skies, nor was our grant of antitrust immunity related to Heathrow access. United/bmi further states that Continental revives an argument the Department has already rejected in Order 2002-4-4 by asserting again that the Advocate General's opinion raises questions as to whether the United Kingdom has the authority to enter into an Open Skies agreement with the United States.

Federal Express states that this proceeding has given the Department the opportunity to break the impasse that has kept the current, restrictive U.S.-U.K. agreement in place; that the United/bmi request at issue here is important because the opportunity the AA/BA alliance offered for progress was lost when those parties requested dismissal of their request; and that the Department should focus on the conclusion of an Open Skies agreement with the United Kingdom since the benefits to the U.S. economy coming from the liberalization of all-cargo services alone under such an agreement would outweigh any uncertainties that Continental cites.

Delta states that, while it neither supports nor opposes Continental's petition, it endorses the Department's objective of concluding an Open Skies agreement with the United Kingdom. It asserts, however, that while our action in Order 2002-4-4 was designed to help achieve that goal, it nonetheless represented a departure from longstanding Department policy of requiring Open Skies as a predicate for the grant of antitrust immunity. Delta states that, notwithstanding this change in procedure, the Department must remain committed to achieving meaningful access to Heathrow for non-incumbent U.S. carriers, and must adhere

² On April 29, 2002, United/bmi filed a joint motion to postpone the date for answers to be filed to Continental's petition until May 17, 2002 (under our rules, answers would normally have been due on May 6, 2002). By Notice dated May 2, 2002, we extended the answer period through May 8, 2002, stating that while we recognized the desire of United/bmi for additional time to respond, we nevertheless had an interest in promptly resolving this matter, and found the more limited extension to be warranted in the public interest.

to its policy objectives to achieve *de facto* access to Heathrow, something the model Open Skies agreement does not address.

Delta states that the six-month implementation condition we imposed in Order 2002-4-4 should be enforced so that the Department and interested parties can reexamine competition issues affecting Heathrow alliances as the market develops, and that we must ensure that a process is in place to address Heathrow access before approving any other alliance requests.

Houston states that it does not take a position on the merits of the United/bmi application, but supports Continental's view that meaningful access to Heathrow for all U.S. carriers, consumers, and cities must be addressed in any new U.S.-U.K. agreement.

Decision

We have decided to dismiss Continental's petition for reconsideration of Order 2002-4-4.

Although filed within the timeframe specified in our rule, we find that Continental's petition is premature. In asserting that an Open Skies agreement must already be in place before we approve and immunize an alliance, Continental is focusing on form rather than substance. As we expressly stated in our final order, "Our grant of approval and antitrust immunity ... will become effective only after the United States has achieved an Open Skies agreement with the United Kingdom that meets our aviation policy objectives."³ Further, in ordering paragraph 16 we provided that the grant of immunity would "become effective 30 days after a U.S.-U.K. Open Skies Agreement that meets U.S. aviation policy objectives is achieved."

We are currently awaiting notification from the U.K. government of its interest concerning negotiations. If negotiations resume and an Open Skies Agreement is reached within the timeframe provided in ordering paragraph 4 of Order 2002-4-4, there will be a more informed basis for the Department and interested parties to consider any petitions for reconsideration that a party might wish to file. The provision of ordering paragraph 16 will permit that to happen in a timely way.

In view of the above, we find that Continental's petition is premature and should be dismissed without prejudice.

ACCORDINGLY,

1. We dismiss the petition for reconsideration of Order 2002-4-4 filed by Continental Airlines, Inc., on April 24, 2002, without prejudice; and

³ Order 2002-4-4 at 10.

2. We will serve a copy of this order on the parties to this proceeding; the Ambassador of the United Kingdom of Great Britain and Northern Ireland in Washington, D.C.; the Federal Aviation Administration; and the Department of State.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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